IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 1, 2010 Session

ROBERT A. CAMPBELL, ET AL. v. JANICE WEST

Appeal from the Chancery Court for Morgan County
No. 08-08 Frank Williams, III, Chancellor

No. E2009-01397-COA-R3-CV - FILED MARCH 22, 2010

Robert A. Campbell and Cynthia L. Campbell ("the Campbells") sued Janice West seeking a declaratory judgment with regard to a right-of-way. Ms. West answered the complaint and filed a motion to dismiss pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief can be granted alleging that a prior lawsuit between these same parties was *res judicata* as to the instant suit. After a hearing, the Trial Court entered an order finding and holding, *inter alia*, that the right-of-way that is the subject of this suit is the same roadway that was at issue in the previous suit between these parties and that all issues between these parties as to that roadway should have been raised in the first suit and are precluded from being raised in this suit. The Campbells appeal. We hold that *res judicata* bars this lawsuit and affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the Court, in which HERSCHEL P. FRANKS, P.J. and CHARLES D. SUSANO, JR., J., joined.

Robert W. Wilkinson, Oak Ridge, Tennessee, for the appellants, Robert A. Campbell and Cynthia L. Campbell.

Andrew N. Hall, Wartburg, Tennessee, for the appellee, Janice West.

OPINION

Background

In December of 2006, Ms. West sued the Campbells alleging, in part, that the Campbells were harassing Ms. West "by coming upon the real property of [Ms. West] and excavating dirt and installing a culvert and traveling across [Ms. West's] real property in the area used by [Ms. West] as a driveway," and by causing several tons of rock to be dumped at the entrance of Ms. West's driveway. The case was tried, and the Trial Court entered an order on June 6, 2007 finding and holding, *inter alia*:

> This cause came on for hearing on the 9th day of May, 2007 pursuant to the Complaint herein filed by Janice West hereafter referred to as West and the Answer thereto and the Counter-Claim filed by Robert and Cynthia Campbell, hereafter referred to as Campbell's [sic]. After testimony of the parties and their witnesses and a review of the exhibits offered it was found that the proof offered did not support the Counter-Claim as to the existence of a right-of-way across West's property for the purpose of ingress and egress to Campbell's property; therefore the Counter-Claim should fail and [Ms. West] should prevail on the relief sought in the Original Complaint.
>
> IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that Robert A. Campbell and Cynthia L. Campbell be, and hereby are restrained and enjoined from coming upon the real property of Janice West.
>
> * * *
>
> IT IS FURTHER ORDERED that Robert A. Campbell and Cynthia L. Campbell be, and hereby are, restrained and enjoined from hindering Janice West's free access to her herein described real property.

The Campbells filed a motion to reconsider alleging, in pertinent part:

> 2. Although [the Campbells] provided evidence that a right-of-way was included with their property and that the same right-of-way had been available to their predecessors in interest in the said property for over 50 years, [the Campbells] failed to show when the right-of-way was established.
>
> 3. By deed dated October 16, 1943, between Grantors, John Brock and his wife, Sarah Brock, of Morgan County, Tennessee, and Grantees, Chris

> Johnson and Seffie Johnson, of Morgan County, Tennessee, the grantors conveyed unto the grantees certain property which was subsequently conveyed on June 21, 1963 from Chris Johnson to Carroll O. Seay which said property was subsequently conveyed from Carroll O. Seay to William West on December 8, 1982, which said property was then conveyed from William West to Janice West on January 18, 1990. In the deed dated October 16, 1943 grantors, John Brock and Sarah Brock, specifically reserved and retained "a road leading over and through a small corner on parcel of land, a part of the land herein conveyed and leading from the Old Fagan Gum Spring to Linsey Roses land 16 feet wide with the hereditaments and appurtenances thereto appertaining…[.]"
>
> 4. Although [the Campbells] failed to provide this evidence at the time of trial, the evidence is a matter of public record and the Court can and should take judicial notice of same.
>
> 5. This Court is a Court of equity and in order to ensure that justice is done, this Court should examine the record for the purposes of ascertaining whether or not Defendants are entitled to a right-of-way across [Ms. West's] property. The record is clear, in spite of the fact it was not established at trial. [The Campbells] clearly are entitled to a right-of-way across [Ms. West's] property and should not be denied their property rights.

The Trial Court denied the motion for reconsideration by order entered November 26, 2007 finding and holding, *inter alia*:

> After arguments of counsel it was found that [the Campbells] had failed to show newly discovered evidence which could not have been discovered prior to trial herein by due diligence and that [the Campbells] further failed to show with particularity why due diligence could have not led to the discovery of the new evidence. Further [the Campbells'] assertion that the opinion rendered by James W. Brooks, Jr. as to the location of an easement to [the Campbells'] property shows new evidence of a transfer of an easement conflicts with that evidence presented at trial and therefore [the Campbells] are in effect seeking to retry this case which is found to not be appropriate under the circumstances.

The Trial Court's November 26, 2007 order was not appealed and became a final judgment.

The Campbells then filed this Complaint for Declaratory Judgment against Ms. West in January of 2008 seeking, in part, a declaration that the Campbells have a right-of-

way that "does not include any portion of the property owned by Janice West such that [the Campbells] should be able to utilize their right-of-way without violating the Court's injunction which enjoins them from crossing Defendant Janice West's property." Ms. West answered the complaint and filed a motion pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief can be granted alleging that the first lawsuit was *res judicata* as to the issues raised in this second suit. The Trial Court held a hearing and then entered its order on June 8, 2009 dismissing the Campbells' complaint and finding and holding:

> After arguments of counsel it was found that the roadway which is the subject of the Complaint herein is the same roadway which was the subject of litigation in a prior case of Janice West vs Robert A. Campbell and Cynthia L. Campbell being case number 06-120 in this court. It was further found that the Complaint and Counter-Claim in the above referenced case made the roadway, which is the subject of this lawsuit, at issue and that during the trial of the above referenced case the consensus of the parties was, and Court was persuaded that, said roadway was included in the property belonging to Janice West. Therefore, all issues related to said roadway should have been raised therein and are precluded from being raised in the instant case.

The Campbells appeal to this Court.

Discussion

Although not stated exactly as such, the Campbells raise one issue on appeal: whether the Trial Court erred in holding that *res judicata* barred this suit.

Although Ms. West raised a motion to dismiss under Tenn. R. Civ. P. 12.02(6), the Trial Court clearly considered matters outside the pleading in support of this motion. Therefore, the motion is correctly treated as one for summary judgment. Tenn. R. Civ. P. 12.02.

Our Supreme Court reiterated the standard of review in summary judgment cases as follows:

> The scope of review of a grant of summary judgment is well established. Because our inquiry involves a question of law, no presumption of correctness attaches to the judgment, and our task is to review the record to determine whether the requirements of Rule 56 of the Tennessee Rules of Civil

Procedure have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Cent. S.*, 816 S.W.2d 741, 744 (Tenn. 1991).

A summary judgment may be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). The party seeking the summary judgment has the ultimate burden of persuasion "that there are no disputed, material facts creating a genuine issue for trial . . . and that he is entitled to judgment as a matter of law." *Id*. at 215. If that motion is properly supported, the burden to establish a genuine issue of material fact shifts to the non-moving party. In order to shift the burden, the movant must either affirmatively negate an essential element of the nonmovant's claim or demonstrate that the nonmoving party cannot establish an essential element of his case. *Id*. at 215 n.5; *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008). "[C]onclusory assertion[s]" are not sufficient to shift the burden to the non-moving party. *Byrd*, 847 S.W.2d at 215; *see also Blanchard v. Kellum*, 975 S.W.2d 522, 525 (Tenn. 1998). Our state does not apply the federal standard for summary judgment. The standard established in *McCarley v. West Quality Food Service*, 960 S.W.2d 585, 588 (Tenn. 1998), sets out, in the words of one authority, "a reasonable, predictable summary judgment jurisprudence for our state." Judy M. Cornett, *The Legacy of Byrd v. Hall: Gossiping About Summary Judgment in Tennessee*, 69 Tenn. L. Rev. 175, 220 (2001).

Courts must view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). A grant of summary judgment is appropriate only when the facts and the reasonable inferences from those facts would permit a reasonable person to reach only one conclusion. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). In making that assessment, this Court must discard all countervailing evidence. *Byrd*, 847 S.W.2d at 210-11. Recently, this Court confirmed these principles in *Hannan*.

Giggers v. Memphis Housing Authority, 277 S.W.3d 359, 363-64 (Tenn. 2009).

With regard to *res judicata* our Supreme Court has instructed:

The doctrine of res judicata, also referred to as claim preclusion, bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or could have been litigated in the former suit.

Massengill v. Scott, 738 S.W.2d 629, 631 (Tenn. 1987); *see also Barnett v. Milan Seating Sys.*, 215 S.W.3d 828, 834-35 (Tenn. 2007). The primary purposes of the doctrine are to promote finality in litigation, prevent inconsistent or contradictory judgments, conserve legal resources, and protect litigants from the cost and vexation of multiple lawsuits. *Sweatt v. Tenn. Dep't of Corr.*, 88 S.W.3d 567, 570 (Tenn. Ct. App. 2002); *see also Moulton v. Ford Motor Co.*, 533 S.W.2d 295, 296 (Tenn. 1976) ("[R]es judicata is not based upon any presumption that the final judgment was right or just. Rather, it is justifiable on the broad grounds of public policy which requires an eventual end to litigation."); *Jordan v. Johns*, 168 Tenn. 525, 79 S.W.2d 798, 802 (1935) ("[P]ublic policy dictates that litigation should be determined with reasonable expedition, and not protracted through inattention and lack of diligence on the part of litigants or their counsel.").

* * *

The "same parties or their privies" requirement for application of res judicata is met here; that the Plaintiffs and the Links were both a part of the original proceeding is not contested. For the judgment dismissing the Links to serve as res judicata … we must, therefore, conclude that the judgment (1) was final, (2) was on the merits, and (3) involved the same cause of action.

* * *

A judgment is final in Tennessee "when it decides and disposes of the *whole* merits of the case leaving nothing for the further judgment of the court." *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 460 (Tenn. 1995) (quoting *Saunders v. Metro. Gov't of Nashville & Davidson County*, 214 Tenn. 703, 383 S.W.2d 28, 31 (Tenn. 1964)).

* * *

In Tennessee, any dismissal of a claim other than a dismissal for lack of jurisdiction, for lack of venue, or for lack of an indispensable party "operates as an adjudication upon the merits," unless the trial court specifies otherwise in its order for dismissal. Tenn. R. Civ. P. 41.02(3).

* * *

"Jurists have found it difficult to give a proper definition" to the term "cause

of action." Black's Law Dictionary 214 (7th ed. 1999) (quoting Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 170 (2d ed. 1899)). Before we can answer the question posed to us by these circumstances, our task is to clearly define the term "cause of action" for res judicata purposes.

* * *

The transactional standard best advances res judicata and the goals of the doctrine: namely, the finality of litigation, consistency and stability of judgments, judicial efficiency and the conservation of resources of both the courts and litigants. We concur with the drafters of the Restatement that the modern system of procedure, in which the transactional approach is grounded,

> allows allegations to be made in general form and reads them indulgently; it allows allegations to be mutually inconsistent subject to the pleader's duty to be truthful. It permits considerable freedom of amendment and is willing to tolerate changes of direction in the course of litigation. . . . [Under the transactional approach, t]he law of res judicata now reflects the expectation that parties who are given the capacity to present their "entire controversies" shall in fact do so.

Restatement (Second) of Judgments § 24 cmt. a. Two suits, therefore, shall be deemed the same "cause of action" for purposes of res judicata where they arise out of the same transaction or a series of connected transactions.

* * *

The doctrine of res judicata "extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same question between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants." *Banks v. Banks*, 18 Tenn. App. 347, 77 S.W.2d 74, 76 (1934) (quoting 34 C.J. 905, § 1313), *cert. denied* (Tenn. 1934).

* * *

Like many of the other states adopting the transactional approach, we observe that even where two claims arise out of the same transaction, the second suit

> is not barred by res judicata unless the plaintiffs had the opportunity in the first suit to fully and fairly litigate the particular issue giving rise to the second suit. For example, when a plaintiff is initially unaware of the existence of a cause of action due to the defendants' own concealment or misrepresentation, whether fraudulent or innocent, a second cause of action is appropriate. Restatement (Second) of Judgments § 26 cmt. j. "The result is different, however, where the failure of the plaintiff to include the entire claim in the original action was due to a mistake, not caused by the defendant's fraud or innocent misrepresentation." *Id*.

Creech v. Addington, 281 S.W.3d 363, 376-82 (Tenn. 2009) (footnotes omitted).

The Campbells admit that the right-of-way at issue in the instant case is the very same right-of-way or roadway that was at issue in the first lawsuit. Furthermore, there is no question that the parties involved in the case now before us on appeal are the same parties as were involved in the first lawsuit. We, thus, must determine whether the judgment in the first suit was final, on the merits, and involved the same cause of action as the case now before us on appeal.

Although the Campbells assert in their brief on appeal: "That Judgment [in the first suit] is not final and conclusive with respect to the rights claimed by the Campbells in [the instant suit]," this assertion is incorrect. A careful and thorough review of the record on appeal reveals that the judgment in the first suit decided and disposed of all issues between these parties leaving nothing for the further judgment of the court. The Trial Court's order in that suit was not appealed, and it became a final judgment. Furthermore, the judgment in the first suit clearly operated as an adjudication on the merits. The case was tried, the Campbells filed a motion to reconsider, and the Trial Court considered and ruled upon all issues presented to it. Therefore, the Campbells' assertion that the judgment was not final and on the merits is incorrect.

The Campbells also argue on appeal that the first lawsuit and the lawsuit now before us on appeal involve different causes of action. We begin our analysis of this argument by noting that the record before us on appeal is sparse. It does not contain all of the pleadings from the first case, nor does it contain the evidence presented to the Trial Court in that first suit. It does, however, contain the complaint, the Campbells' motion for reconsideration, and the Trial Court's order denying this motion.

Applying the transactional test set out by our Supreme Court in *Creech* to determine whether the two suits involve the same cause of action for purposes of *res judicata*, we find and hold, as did the Trial Court, that the first suit and the suit now before

us on appeal both concern the same right-of-way or roadway and that both sought to establish the same rights between these parties, i.e., the right to use this roadway. Both suits arose from the same operative facts. The Campbells had the opportunity to establish during the trial in the first suit who held legal title to the land in question, and they freely admit that they failed to do so. They then attempted in their motion to reconsider to make this showing. Thus, the issue was squarely before the Trial Court in the first suit, and the Trial Court's judgment in that suit was not appealed and became a final judgment.

There are no allegations whatsoever that the Campbells were unaware of their cause of action due to any concealment or misrepresentation by Ms. West. Rather, in their motion for reconsideration in the first suit, the Campbells freely acknowledged that they failed to present evidence which was available to them prior to that trial. There has been no change in the operative facts since the first trial, and the legal rights or relations of the parties have not changed.

The issue presented in the case now before us on appeal was presented to the Trial Court in the first suit. Although we are unable to determine the substance of the counter-claim upon which the Trial Court ruled in its June 6, 2007 order, we are able to determine from the record before us on appeal that, at the very least, the Campbells presented the issue to the Trial Court in their motion for reconsideration. The Trial Court held a hearing, considered the issue, and then entered its order denying the motion. The Campbells chose not to appeal the Trial Court's order, and it became a final order. The Campbells cannot now gain a second bite at the apple by filing a second suit. We hold, as did the Trial Court, that *res judicata* bars this lawsuit, and we, therefore, affirm the Trial Court's June 8, 2009 order.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellants, Robert A. Campbell and Cynthia L. Campbell, and their surety.

_____

D. MICHAEL SWINEY, JUDGE